

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Performance Measurements and Standards for)	
Unbundled Network Elements and)	CC Docket No. 01-318
Interconnection)	
)	
Performance Measurements and Reporting)	
Requirements for Operations Support)	CC Docket No. 98-56
Systems, Interconnection, and Operator)	
Services and Directory Assistance)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
Petition of Association for Local)	
Telecommunications Services for Declaratory)	CC Docket Nos. 98-147, 96-98, 98-141
Ruling)	

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Table of Contents

INTRODUCTION AND SUMMARY	2
I. THE COMMISSION’S TOP PRIORITY MUST BE TO PROMOTE LOCAL TELECOMMUNICATIONS COMPETITION.	6
II. WITH ONE KEY EXCEPTION, THE COMMISSION SHOULD RELY ON MEASURES AND STANDARDS FOR UNES AND INTERCONNECTION FACILITIES THAT HAVE ALREADY BEEN ESTABLISHED BY THE STATES.	10
A. The Commission Deferred to the States for Regulation of ILEC Performance.	10
B. State Commissions Have Worked Diligently To Implement Performance Plans that Are Largely Satisfactory.	13
III. THE COMMISSION SHOULD BUILD ON EXISTING STATE PERFORMANCE MEASUREMENT SYSTEMS BY CRAFTING A FEDERAL REGIME OF MEANINGFUL PENALTIES FOCUSED ON A SUBSET OF KEY STATE MEASUREMENTS.....	23
A. Existing Remedies Are Inadequate To Ensure ILEC Compliance with the 1996 Act; More Severe Penalties Are Required.	23
B. The Commission Should Use its Powers Aggressively To Enforce Compliance with State Performance Standards, Building on State Processes and Expanding the State Penalty Amounts.	28
C. Limited Clarification of State Performance Plans Is Needed To Establish a Meaningful System of Consequences.	33
D. The Proposed Federal Enforcement Plan Should Apply Only to ILECs.	37
IV. THE COMMISSION NEED NOT CONCERN ITSELF WITH “BURDENS” ON ILECS OR SUNSETTING PROVISIONS.	38
A. Requiring Compliance with Performance Measures and Standards Is Not a Burden.	38
B. The Need for a Federal Enforcement Plan Subsides as Competition Grows.	40
CONCLUSION.....	42

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COMMENTS OF AT&T CORP.

AT&T Corp. (“AT&T”) hereby responds to the Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/} The *Notice* seeks to ascertain whether a federal regime of performance measures, performance standards, reporting requirements, and related enforcement mechanisms should be established to ensure that incumbent local exchange carriers (“ILECs”) comply with their statutory obligations to provide competitive local exchange carriers (“CLECs”) with nondiscriminatory access to unbundled network elements (“UNEs”) and interconnection.^{2/}

^{1/} Notice of Proposed Rulemaking, CC Docket Nos. 01-318, 98-56, 98-147, 96-98, 98-141, 16 FCC Rcd. 20641 (2001) (“*Notice*”).

^{2/} The *Notice* also seeks comment on collocation intervals “[t]o the extent not already addressed by commenters in CC Docket Nos. 98-147 and 96-98.” *See Notice*, ¶ 13. AT&T has

New federal efforts to promote access to UNEs are indeed urgently needed, but they should build on the work already accomplished in the states. As an alternative to the approach proposed in the *Notice*, AT&T therefore urges the Commission to act promptly to establish a federal *enforcement* regime based on the measures and standards implemented by the state commissions. This approach would promote compliance with the Telecommunications Act of 1996 (“1996 Act”), foster the competition that Congress sought to promote, and further the Commission’s efforts to partner with its state counterparts. Moreover, a federal enforcement regime could advance the Commission’s goal of reduced regulation, by directing the ILECs to provide UNEs and interconnection in a manner that substantially mirrors the way in which a competitive market for such capabilities would operate and by reducing the Commission’s involvement in the evaluation of specific metrics and standards.

INTRODUCTION AND SUMMARY

Competition in local telecommunications is the main objective of the 1996 Act. When local competition thrives, consumers of local telecommunications services will experience the same benefits -- lower prices, increased innovation, and better service -- that competition has already delivered to long distance consumers. But this worthy objective remains largely unfulfilled because of the ILECs’ resistance, obstructionism, ceaseless litigation, strategic incompetence, and other delaying strategies. ILECs continue to exhibit such anticompetitive behavior, particularly with regard to their UNE and interconnection obligations. As a result,

fully presented its position regarding collocation intervals in those dockets and does not repeat them here. *See* Comments of AT&T Corp., CC Docket Nos. 98-147, 96-98 at 69-74 (Oct. 12, 2000) (proposing that the Commission adopt national standards for collocation space provisioning for cageless collocation of conditioned space, virtual collocation, and augmentation of existing physical collocation space, as well as space reservation policies for transport equipment, digital cross-connect systems, and switching equipment); Reply Comments of AT&T Corp., CC Docket Nos. 98-147, 96-98 at 7-38 (Nov. 14, 2000).

CLECs continue to be hindered in their efforts to compete,^{3/} in large part because the ILECs face no meaningful deterrents to their unlawful conduct.

The ILECs' unique control of local bottleneck facilities was a fundamental concern underlying the 1996 Act. Congress specifically recognized that it would be impossible for competitors -- even in the aggregate -- to replicate the ILECs' ubiquitous networks or their economies of scale, especially during the early stages of local market entry.^{4/} For this reason, Congress required the ILECs to provide requesting carriers with just, reasonable, and nondiscriminatory access to interconnection and unbundled elements of the incumbents' networks.^{5/}

Nearly six years later, it is clear that the ILECs' myriad delaying tactics have prevented CLECs from obtaining efficient access to UNEs and thereby forestalled the development of effective local competition. In sharp contrast to the long distance market, competition in local markets is still in an early stage, and CLECs typically have no viable option other than to use

^{3/} See Letter from Michael K. Powell, Chairman, FCC to Leaders of the Senate and House Commerce and Appropriations Committees (May 4, 2001) ("*Powell 5/4 Letter*") ("CLECs may have been stymied by practices of incumbent local exchange carriers that appear designed to slow the development of local competition").

^{4/} See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd. 15499, ¶ 4 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd* by *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (a primary Congressional goal of the 1996 Act is the promotion of competition that would eliminate the ability of ILECs to use their "control of bottleneck local facilities to impede free market competition."). Cf. *Notice*, ¶ 1 n.1 (recognizing the ILECs' "historical control over essential 'bottleneck' facilities"). AT&T and other carriers have developed a detailed record regarding competitive carriers' reliance on incumbent facilities. See, e.g., Reply Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services and Declaration of Anthony Fea and William J. Taggart III on Behalf of AT&T Corp. (filed April 30, 2001) ("*Fea-Taggart Declaration*") (showing that, although competitors have invested billions of dollars in building their own facilities, they remain heavily reliant on the incumbents' facilities).

^{5/} 47 U.S.C. §§ 251(c)(2), (3).

ILEC UNEs and interconnection facilities. Despite Congress's unambiguous statutory mandate, ILECs continue to provide discriminatory or commercially unreasonable access to those critical functionalities.

The *Notice* properly recognizes that the Commission must focus its energies on enforcing these fundamental ILEC legal obligations.^{6/} But the *Notice* also expresses a willingness only to consider adopting a “select group” of measures, and it rules out developing a “new set of substantial and burdensome requirements.”^{7/} And, in a number of places, it places at least as much importance on reducing regulation as on promoting competition.^{8/} In light of those considerations, and the extent to which the states have already (with the Commission's approval) shouldered the responsibility of developing detailed performance measures, standards, and reporting requirements for UNEs and interconnection,^{9/} AT&T believes that the Commission's

^{6/} *Notice*, ¶¶ 1-2, 21-22. As a threshold matter, and as the Commission acknowledges, the Commission's legal authority is not an issue. *Notice*, ¶ 14 (citing 47 U.S.C. §§ 201(b), 251, 252 and *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999)). Moreover, the application of meaningful enforcement is fully consistent with both the letter and the spirit of the law. Indeed, the Commission has already found that the availability of enforcement programs is probative in making determinations on Section 271 applications. *See Notice*, ¶ 15.

^{7/} *See id.*, ¶¶ 1, 3.

^{8/} *See id.*, ¶ 3 (items intended to “serv[e] a deregulatory purpose while nevertheless advancing the procompetitive scheme of the [1996] Act”), ¶ 4 (item is intended to “further[] a deregulatory yet procompetitive goal”), ¶ 7 (desire to balance objectives of enforcing section 251 and “minimizing the burdens imposed on dominant carriers”), ¶ 16 (one of the item's “primary goals” is “not [to] increase incumbent carriers' regulatory burdens”), ¶ 19 (same), ¶ 20 (interest in “decreas[ing] incumbent carriers' overall regulatory burdens”).

^{9/} The Commission previously determined that the adoption of national performance measurement rules “may prove unnecessary” when it initiated its previous rulemaking on performance measurements. There, it acknowledged, valued, and deferred to the work of the states on these key issues. *See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, CC Docket No. 98-56, 13 FCC Rcd. 12820, ¶¶ 22-24 (1998) (“*OSS Notice*”) (stating that “the primary goal of this notice is to provide the requested guidance to the states,” to allow them “to continue their work and to incorporate the model rules to the extent they deem appropriate”).

energies should be directed to the prompt implementation of a federal *enforcement* regime that assures ILECs will face meaningful consequences for failed performance, based on the performance reports that they already provide to state commissions. A federal enforcement plan that relies on state performance measurements, standards, and monitoring would complement the states' enforcement processes, so that both federal and state enforcement plans can operate as an integrated whole to achieve the 1996 Act's pro-competitive mandates. This approach also offers the least "regulatory" way in which the Commission can fulfill its own duty to enforce the 1996 Act.

As discussed below, there is absolutely no justification for the Commission to undermine the performance measurement requirements already established by the state commissions, which were largely based on guidelines the Commission itself suggested. It would be one thing for the Commission to seize the opportunity to build on the states' work, using a "best of the best" approach to establish a single federal regime that ensures that *all* competitors in *all* states benefit from the substantial progress that has already been made by a significant number of states.^{10/} It is quite another to contemplate a limited (and inadequate) set of federal rules that could undermine the progress already made by the states. An open-ended process of that sort would cause additional regulatory delay, inefficiency, and market uncertainty, and thereby further forestall competitive entry.

^{10/} This is the approach contemplated by S. 1364, a bill introduced by Senator Ernest Hollings, Chairman of the Senate Commerce, Science, and Transportation Committee. Significantly, this legislation would require the Commission to adopt final rules within six months, would require it to prescribe "the most rigorous performance standards, data validation procedures, and audit requirements" adopted by any state commission, and would be directed toward the sole objective of achieving full compliance with the 1996 Act's requirements that local telecommunications markets be opened to competition. AT&T has endorsed that legislation and reaffirms that support today.

Under these circumstances, what CLECs and consumers need most is for the Commission to become actively involved in enforcement and to ensure that ILECs comply with their duties under Section 251(c) of the 1996 Act. The most efficient way to do so is to adopt an enforcement regime that attaches appropriate consequences when ILECs fail to comply with existing state standards. With the limited exceptions of performance benchmarks for “hot cuts” and a statistical model that balances random variation errors, the existing state measures and standards provide a strong foundation upon which the Commission can build an efficient and effective enforcement plan that can be implemented promptly -- and is also deregulatory. Given the perilous state of local competition today, the time for decisive Commission action is now.

I. THE COMMISSION’S TOP PRIORITY MUST BE TO PROMOTE LOCAL TELECOMMUNICATIONS COMPETITION.

The heart of the 1996 Act was Congress’s commitment to replace monopoly with competition in the provision of local telecommunications services. The Commission acknowledged this important goal in its recent Notice of Proposed Rulemaking initiating the triennial review of UNEs, which emphasized the need to ensure that the “regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act .

...^{11/}

As the Commission recognizes, UNEs play a vital role in the 1996 Act’s statutory scheme. Congress created three separate pathways (*i.e.*, resale of ILEC services, purchase of UNEs, and construction of new facilities) for competitors to enter the local telecommunications

^{11/} *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket Nos. 01-339, 96-98, 98-147, ¶ 1 (rel. Dec. 20, 2001) (“Triennial UNE Notice”).*

market.^{12/} For simple economic reasons, competing in the local market through resale is not viable because the arbitrage opportunities are extremely limited and generally uneconomic as a long term strategy. Similarly, construction of new facilities is not a feasible short-run market entry strategy, especially for mass-market customers.^{13/} Deployment of telecommunications infrastructure requires enormous up-front costs and entails lengthy deployment intervals for equipment and facilities.^{14/} As a result, competitive carriers cannot undertake such a strategy and immediately generate sufficient cash flows to encourage a further influx of necessary funding from investors. Thus, CLEC use of UNEs is the only effective method of near-term entry in the local market, especially for residential consumers and a large portion of the business market, and it also provides a migration path toward increased reliance on CLEC facilities and ultimately broader facilities-based competition.

When Congress ordered ILECs to provide CLECs with nondiscriminatory access to UNEs -- the piece-parts of the ILECs' networks -- it recognized that ILECs exert pervasive control over these essential inputs to their competitors' services. As the Commission has also correctly recognized, a monopolist's natural incentives preclude it from voluntarily opening its

^{12/} See, e.g., *Triennial UNE Notice*, ¶ 3.

^{13/} In the *UNE Remand Order*, which was released in late 1999, the Commission concluded that, for example, self-provisioning of loops "is not a viable alternative to the incumbent's unbundled loops because replicating an incumbent's vast and ubiquitous network would be prohibitively expensive and delay competitive entry." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, ¶ 182 (1999) ("*UNE Remand Order*"). The financial outlook for CLECs has only grown dimmer since that time. Thus, the Commission's determination has even greater force today.

^{14/} Construction of new facilities is extremely time-consuming, taking months or even years to complete. *Fea-Taggart Declaration* at 5-6. Indeed, the ILECs themselves built their local networks over many decades -- and with the protection of a government-conferred monopoly. CLECs could not reasonably be expected to replicate the ILECs' local networks in only a few years, especially when those years have been filled with investment-detering litigation, obstruction, and other complications.

market by providing competitors with nondiscriminatory access to its network.^{15/} This is why Congress found it necessary to require *by statute* that the ILECs act in a manner that is inconsistent with those natural inclinations. But the enactment of Section 251(c) did not (and could not) alter the ILECs' incentives. Thus, it is not surprising that ILECs' actual performance in provisioning UNEs and interconnection has often been woefully deficient. For the Commission to fulfill its statutory duties, then, it is essential that it take a much more active role in assessing the ILECs' performance and adopt an enforcement program that provides the ILECs with sufficient incentives to rectify their performance failures and to prevent re-occurrence of such failures.

Poor ILEC performance has routinely been detected, but such detection has not resulted in consequences that are large enough to cause the ILECs to reform their anti-competitive behavior. Indeed, as financial analysts have recently observed, "as long as the cost of violating [performance requirements] is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government for violating certain performance targets versus completely opening up the local markets to competitors."^{16/} In short, ILECs will continue to provide substandard service unless the consequences of doing so are more than a mere cost of doing business.

^{15/} *Local Competition Order*, ¶ 10 ("Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market"), ¶ 55 ("[I]ncumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services"), ¶ 218 ("Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself").

^{16/} Ken Hoexter, Merrill Lynch Global Securities, *RBOCs Continue to Pay Fines Highlighting Difficulties for Competitors, But Are Improving*, HOEXTER'S BROADBAND BITS, Issue #99 (Dec. 28, 2001).

Because the *status quo* is not working, the Commission must redouble its efforts and re-focus its energies to ensure that ILECs provide UNEs and interconnection facilities on a timely, reliable, and nondiscriminatory basis. This not only will advance competition, but also will promote the related, but subsidiary, goal of deregulation. Indeed, although Chairman Powell is obviously correct in stating that “deregulation for its own sake is not responsible policy,”^{17/} vigorous Commission enforcement of appropriate performance measures and standards will go a long way toward creating an environment that supports robust competition that, in turn, can justify commensurate deregulation.

In sum, competition cannot develop without proven and sustained nondiscriminatory performance by the ILECs, because inadequate ILEC support for UNEs and interconnection facilities translates into little, if any, effective competition. In contrast, when new entrants are able to compete on a level playing field with the incumbents (*i.e.*, without discrimination), economically efficient competition will have an opportunity to flourish. Congress unquestionably regarded such competition as the predicate for deregulation. This view is most clearly reflected in Section 10 of the Act, which expressly forbids the Commission to forbear from enforcing the pro-competitive provisions of Sections 251 and 271 of the 1996 Act until those provisions have been “fully implemented.”^{18/} Similarly, the 1996 Act provides that, in biennial reviews, the Commission is to review regulations to determine whether they are no

^{17/} See Remarks by Michael K. Powell, Federal Communications Commission, to Federal Communications Bar Association (June 21, 2001) (“*Powell 6/21 Remarks*”).

^{18/} 47 U.S.C. § 160(d). The primacy of competition over deregulation is also reflected in 47 U.S.C. § 271(d)(3)(A) (Bell companies to be authorized to offer long distance service only *after* they have fulfilled their local market-opening obligations).

longer needed “*as the result of meaningful economic competition.*”^{19/} Thus, the Commission *cannot* disregard its statutory mandates until competition has gained a firm foothold.

Under the enforcement proposal described below, the goals of competition and deregulation are both accommodated. By developing an enforcement regime that applies significant self-executing penalties for deficient ILEC provisioning based on the performance reports they *already* submit to the states, the Commission can create significantly increased incentives for ILECs to comply with the 1996 Act without imposing additional regulatory burdens on the incumbents. This, in turn, should lead to increased competition that could set the stage for future deregulation.

II. WITH ONE KEY EXCEPTION,^{20/} THE COMMISSION SHOULD RELY ON MEASURES AND STANDARDS FOR UNES AND INTERCONNECTION FACILITIES THAT HAVE ALREADY BEEN ESTABLISHED BY THE STATES.

A. The Commission Deferred to the States for Regulation of ILEC Performance.

Soon after passage of the 1996 Act, CLECs sought Commission leadership to develop national performance measures, standards, and reporting requirements.^{21/} In particular, the CLECs sought the adoption of minimum national performance standards so they would not have to litigate them in virtually every state. The ILECs, however, strenuously resisted the adoption of national performance standards.^{22/} The Commission chose a limited role, issuing proposed

^{19/} 47 U.S.C. § 161(a)(2) (emphasis added).

^{20/} The single exception is the inadequate benchmark standards that apply to ILECs’ performance in implementing hot cuts. *See infra* Section IV.C.; *see also infra* n.78.

^{21/} *See* Petition for Expedited Rulemaking by LCI International Telecom Corp. and Competitive Telecommunications Association, CC Docket No. 96-98 (May 30, 1997) (proposing comprehensive, detailed federal performance standards developed by the Local Competition Users Group (“LCUG”), which was comprised of LCI, MCI, Sprint, WorldCom, and AT&T).

^{22/} Notably, both before and after the *OSS Notice*, some ILECs argued vociferously *against* the adoption of national standards and in *favor* of state performance standards. *See, e.g.*, Comments of BellSouth Corporation, RM-9101 at 14-19 (July 10, 1997) (federal performance

guidelines, soliciting comment on those guidelines, and then taking no further action.^{23/} In short, the Commission -- with the strong support of the ILECs^{24/} -- “punted” these decisions to the states.

In the nearly four years that have elapsed since the Commission deferred action on ILEC performance measurements and standards, the state commissions, ILECs, CLECs, and other

standards for UNEs are unnecessary, inappropriate, and superfluous); Comments of the Bell Atlantic Telephone Companies, CC Docket No. 98-56 at 3 n.3 (June 1, 1998) (reminding the Commission of the burden of national standards: “a single national set of performance measurements would not take into account the differences in underlying systems and would produce meaningless information”); Comments of SBC Communications Inc., CC Docket No. 98-56 at 2 (June 1, 1998) (requesting that the Commission respect prior agreements made at the state level and not “re-create the wheel,” which would impose undue burden on ILECs). For their part, the states, through the National Association of Regulatory Commissioners (“NARUC”) resolution adopted November 11, 1997, advocated that they should retain the “ability to establish the actual performance benchmarks, or the minimum performance requirements, based upon the applicable ILEC’s own performance data.” *See* Reply Comments of the National Association Regulatory Utility Commissioners, CC Docket No. 98-56 at 8 (July 6, 1998).

^{23/} The Commission concluded that “adoption of *model* performance measurements and reporting requirements to serve as *guidelines* for state commissions constitutes the most efficient and effective role for the Commission in this area at this time.” *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, CC Docket No. 98-56, 13 FCC Rcd. 12817, ¶ 4 (1998) (“*OSS Notice*”) (emphasis added). Notably, the special master assigned by the Colorado state commission to develop a report and recommendation on the type of Performance Assurance Plan that would work best for Colorado stated in his final report that the Commission “has not . . . mandated a specific model for wholesale performance assurance plans, leaving the state agencies with considerable judgment in how to design them.” *Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Final Report and Recommendation, Docket No. 011-041T at 2-3 (June 8, 2001) (“*Colorado Remedies Report*”).

^{24/} Even recently, just prior to the issuance of this *Notice*, some ILECs acknowledged the value of state performance plans and recommended that any federal plan implemented should not supplant state plans, but rather should build on them. *See* Letter from Robert T. Blau, BellSouth to Dorothy Attwood, Chief, FCC, CC Docket No. 96-98 at 1 (Oct. 18, 2001) (requesting that state performance measures continue to apply); Letter from Caryn Moir, SBC Communications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 at 1 (Oct. 16, 2001) (recommending that a national model “must use existing state standards as models where possible, allowing SBC to use previous investment in reporting systems and processes where reasonable”).

interested parties have picked up where the Commission left off and invested enormous resources to address the details and problems of implementing and enforcing performance requirements. As discussed at greater length in the following section, these state efforts have occurred in interconnection arbitrations, rulemakings, complaints, collaboratives, and numerous other proceedings. Thus, the states have assumed the responsibility deferred to them and have invested significant resources to implement their decisions on performance issues, all of which were based upon extensive input from, and interaction with, industry participants. Indeed, for the core measurements, especially those listed in the current *Notice*, virtually every major state has implemented, or is in the process of implementing, a reasonable and mostly acceptable version of those measurements.

These state efforts should not be negated. The industry and the state regulators have done exactly what the Commission intended. Given this history, and especially the ILEC support for the state processes, it would be inappropriate for the Commission to undermine the states' efforts at this time.^{25/} Except under the legislative strictures that S. 1364 would establish, an intensive effort to construct a federal system of performance measurements and standards that overlays the state systems would -- at best -- simply bring the Commission to the same point where the states have already arrived.^{26/}

Further, such an exercise would unnecessarily consume time and resources of all parties, while ILECs re-litigate, yet again, performance measures and standards that have been

^{25/} In contrast with the situation for UNEs, the Commission must take the lead in establishing performance measures and standards for *interstate special access*. See Comments of AT&T Corp., CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, and 00-229 and RM 10329 at 17 (Jan. 22, 2002). But even for special access, the Commission's decisions can be informed by the valuable work done by (and in) the states for UNE and interconnection metrics.

^{26/} This "best case" scenario contemplated by S. 1364 cannot be achieved if this proceeding is intended to produce only a limited set of measures and if the 1996 Act's goal of competition is subordinated to the goal of deregulation or to concerns about "burdens" on dominant carriers.

extensively litigated in the states.^{27/} Moreover, to “reinvent the wheel” with an overlapping federal system would be inconsistent with the Commission’s deregulatory objectives and create unavoidable inconsistencies with state plans. Accordingly, if the Commission decides not to adopt rules consistent with S. 1364, its efforts to ensure proper provisioning of UNEs and interconnection facilities should focus on use of its enforcement powers to penalize discriminatory behavior that is reflected in the performance results ILECs report to the states.^{28/}

B. State Commissions Have Worked Diligently To Implement Performance Plans that Are Largely Satisfactory.

The 1996 Act is a federal statute, and there is clearly a federal need to ensure that all states are taking the steps necessary to ensure that all required market-opening measures are properly executed. But this does not warrant new federal standards that will not improve on the states’ performance plans. The performance measurements, standards, and reporting requirements developed by the states generally cover the full scope of competition-affecting performance.^{29/} Indeed, many states’ performance metrics include, and appropriately go beyond, the “select group” of measures discussed in the current *Notice*. They generally incorporate reasonable performance metrics, as well as appropriate performance standards.^{30/} The states and affected parties have committed enormous resources to these efforts, and by and large they have made significant progress toward resolving performance measurement and monitoring issues.

^{27/} Notably, only the ILECs have the resources to squander on such proceedings.

^{28/} Even if the Commission elected to fully address S. 1364, it could and should, while undertaking the consideration, implement substantially strengthened performance incentives, as proposed here by AT&T.

^{29/} See *Notice*, ¶¶ 15-16.

^{30/} Even if there are existing weaknesses in the current plans, periodic reviews are part of the process and allow problems to be addressed. *But see infra* Section III.B.

Under these circumstances, the notion of expending significant effort to devise a new -- but limited -- set of performance measures, which would then serve as a basis to “supplant” (meaning preempt) the states’ efforts,^{31/} makes no sense. To proceed in this manner would waste limited CLEC resources, frustrate the diligent work of the states and the industry over the past several years, and be an affront to the states that have acted.^{32/} Instead, the Commission should maximize the expertise that the states have developed in performance plans by relying on their performance measures and standards, and intervene only to the limited extent necessary.

A detailed review of all the various state efforts to develop performance metrics is unnecessary, but it is important for the Commission to understand that the states have actively sought to discharge their responsibilities properly with regard to development of measurements, standards, and business rules. For instance, the New York Public Service Commission (“PSC”), one of the first state commissions to examine ILEC performance and enforcement closely, initiated a proceeding in 1999 to investigate performance measures and adopt an order on performance standards and remedies to ensure proper implementation of interconnection agreements.^{33/} The New York PSC elicited industry input through a supervised collaborative

^{31/} See Notice, ¶ 18.

^{32/} In fact, the reconsideration of the wider range of metrics and measurement related issues would only play into the ILECs’ hands. It would allow them an opportunity to defer the implementation of national performance incentives, especially if the Commission were to become mired in a wholesale reconsideration of matters that the states have already resolved. Inevitably, the ILECs would seek to dilute the existing state systems to the lowest common denominator.

^{33/} See Cases 97-C-0271 and 99-C-0949, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Petition Filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, in 97-C-0271, Notice of Proposed Rulemaking (N.Y. P.S.C. Aug. 30, 1999), and Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan (Nov. 3, 1999) (“*New York Performance Plan*”). The measures in the New York Performance Assurance Plan were taken

process and developed a set of performance measures that generally addressed the concerns of competitors as well as Verizon. The resulting New York plan provides competitors with three essential components -- clearly defined measures and standards, comparative methods to establish whether performance is compliant, and a remedy plan when performance results are found non-compliant -- for each of the statutory modes of competitive entry.^{34/} The collective workshop of industry experts that worked with the New York Commission in this endeavor, now known as the Carrier-to-Carrier Forum (“Forum”),^{35/} continues to produce new measures, eliminate redundancies, and refine reporting, as well as determine if the existing measures are still valuable and reliable. Importantly, the work of the Forum is useful not only in New York, but also in the other states throughout the Verizon footprint.^{36/}

from Carrier-to-Carrier Guidelines, which were developed in a collaborative process between CLECs and Verizon. *See* Case 97-C-0139, *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Order Adopting Inter-Carrier Service Quality Guidelines (N.Y. P.S.C. Feb. 16, 1999), Establishing Permanent Rule (June 30, 1999), and Order Establishing Additional Inter-Carrier Service Quality Guidelines and Granting in Part Petitions for Reconsideration and Clarification (Feb. 16, 2000).

^{34/} Originally, the New York plan incorporated separate standards and measures for resale, UNEs, collocation, and interconnection. More recently, the measures for collocation and interconnection have been combined and a new set of measures for DSL has been added. *See* Case 99-C-0949, *Petition Filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, Filed in Case 97-C-0271*, Order Amending Performance Assurance Plan (N.Y. P.S.C. Dec. 15, 2000) (adding xDSL mode of entry to the Bell Atlantic-New York Performance Assurance Plan and demonstrating not only the comprehensiveness but also the flexibility of the New York process).

^{35/} Previously, an Administrative Law Judge monitored the New York proceeding. When Verizon received Section 271 authority, the New York PSC converted the proceeding into a collective workshop with less oversight by the PSC.

^{36/} In fact, Verizon favors the New York performance measures so much that it has attempted to leverage the work done in New York into other Verizon states (*i.e.*, Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire, Maine, Pennsylvania, and Virginia.) *See, e.g.*, D.T.E. 99-271, *Investigation by the Department of Telecommunications and Energy upon its own motion pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of Verizon New England Inc. d/b/a Verizon Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA*

Likewise, the Texas Public Utilities Commission conducted collaborative workshops with industry experts to reach a consensus on the key performance measurements and standards.^{37/} SBC has implemented a similar version of the Texas plan throughout all of the old Southwestern Bell states.^{38/} More recently, SBC has attempted to establish Texas-like performance plans in the former Ameritech region. Notably, the state commissions in the Ameritech region are tailoring the Texas plan to their individual states' needs, adopting the best parts of the Texas plan and supplementing that plan with other, more competition-friendly, provisions after conducting hearings and workshops that looked at the benefits and disadvantages of the Texas plan.^{39/}

(long distance) telephone market, Order Adopting Performance Assurance Plan (Mass. D.T.E. Sept. 5, 2000) (“*Massachusetts Performance Plan*”); Docket Nos. 3195 and 3256, *Verizon-Rhode Island’s Proposed Carrier-to-Carrier Performance Standards and Reports and Performance Assurance Plan for Rhode Island*, Report and Order (R.I. P.U.C. Dec. 3, 2001) (“*Rhode Island Performance Plan*”).

^{37/} See *Investigation of Southwestern Bell Telephone Company’s Entry Into the Texas InterLATA Telecommunications Market*, Order #55 Approving the Texas 271 Agreement, Project No. 16251 (Tex. P.U.C. Oct. 13, 1999) (“*Texas Performance Plan*”).

^{38/} SBC proposed the plan it developed for Texas in Arkansas, Missouri, Oklahoma, and Kansas. See, e.g., Case No. TO-99-227, *Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Order Regarding Recommendation on 271 Application of the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A) (Mo. P.S.C. Mar. 15, 2001) (adopting and implementing Southwestern Bell’s performance remedy plan in the Missouri Section 271 Interconnection Agreement (“M2A”)); Case No. PUD 970000560, *Application of the Attorney General of the State of Oklahoma, AT&T Communications of the Southwest, Inc., Brooks Fiber Communications of Tulsa, Inc., Cox Oklahoma Telecom, Inc., MCI Telecommunications Corporation, and Sprint Communications, L.P. to Explore Southwestern Bell Telephone Company’s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Order Regarding Recommendation on 271 Application Pursuant to Telecommunications Act of 1996, Order No. 445180 (Okla. Corp. Comm’n Sept. 28, 2000) (adopting and implementing Southwestern Bell’s performance remedy plan in the Oklahoma 271 Agreement (“O2A”)).

^{39/} See, e.g., *Petition for Resolution of Disputed Issues Pursuant to Condition 30 of the SBC/Ameritech Merger Order*, Brief of the Staff of the Illinois Commerce Commission, Docket

In the former PacBell territory, the California Public Utilities Commission (“PUC”) is close to issuing a final performance standards and remedy plan, following negotiations and collaboration between competitors and the ILECs that began in 1997.^{40/} The CLEC coalition and the ILECs have reached agreement on the measures and standards, but they have failed to agree on remedies. As a result, the California PUC recently issued two orders on remedies -- an interim order dealing with statistical methodology and the manner in which compliant or non-compliant performance will be determined^{41/} and a draft order refining assessment methodologies and the transformation of data into consequence amounts.^{42/} There is an interim plan in place, and payments for performance problems are scheduled to start during a six-month trial period.

Similarly, the Regional Operating Committee (“ROC”), a collection of staff members from each state regulatory agency in the Qwest region (except for Arizona, which has chosen to pursue its own performance plan and remedies), has also produced a workable measurement

No. 01-0120 (Sept. 27, 2001) (“*ICC Staff Brief*”) (Illinois Commerce Commission (“ICC”) staff recommends that all performance measures be made of equal, high importance, not varying levels of importance (*i.e.*, low, medium, or high importance) for different measurements, noting that the varying levels of importance were agreed to in the Texas collaborative, but not the Illinois collaborative on performance measurements).

^{40/} The performance standards and remedy plan under consideration by the California Public Utilities Commission would apply to both Pacific Bell and Verizon.

^{41/} Rulemaking 97-10-016, Investigation 97-10-017, *Order Instituting Rulemaking on the Commission’s Own Motion into Monitoring Performance of Operations Support Systems, Order Instituting Investigation on the Commission’s Own Motion into Monitoring Performance of Operations Support Systems*, Interim Opinion on Performance Incentives, Decision 01-01-037 (Cal. P.U.C. Jan. 18, 2001) (“*California Interim Opinion*”).

^{42/} Rulemaking 97-10-016, Investigation 97-10-017, *Order Instituting Rulemaking on the Commission’s Own Motion into Monitoring Performance of Operations Support Systems, Order Instituting Investigation on the Commission’s Own Motion into Monitoring Performance of Operations Support Systems*, Opinion on the Performance Incentives Plan, Draft Decision (Cal. P.U.C. Nov. 21, 2001) (“*California Draft Performance Plan*”) (comments on the Draft Decision were filed in December 2001 and reply comments were filed earlier this month).

set^{43/} and a corresponding remedy plan. The ROC plan includes detailed descriptions, business rules, and disaggregation levels for the performance standards necessary to competitors. The ROC plan also allows the state performance metrics to be sensitive to state-specific issues, such as the particular mix of customers in that state and the predominant types of services or technologies used in the state, as well as individual CLEC business plans. For instance, in Colorado, the state commission took into account competitors' use of new technologies (*i.e.*, the significant broadband investment in the state) and developed standards and remedies accordingly. As was the case in many states, the participants could not reach agreement and an arbitrator resolved the remaining issues related to consequences for failed performance. Thus, each ROC state now has performance measures, standards, and remedy plans available.^{44/}

Like other state commissions, the Florida Public Service Commission ("PSC") has developed and implemented performance requirements and an enforcement program for BellSouth,^{45/} which began with collaborative workshops between ILECs and CLECs (referred to as Alternative Local Exchange Companies ("ALECs") in Florida). Other state commissions in

^{43/} The measurement set is highly consistent with both the set of measures reflected in the Commission's CC Docket No. 98-56 and in the LCUG proposed measurement set issued in Version 6.1, dated September 26, 1997 (submitted by LCI International Telecom Corp. *Ex Parte* on Sept. 29, 1997 in CC Docket No. 98-56). A document reflecting the then-current LCUG consensus was provided to the Commission during its consideration of performance measurements and standards in Docket 98-56. The LCUG documentation of service quality measurements was also a starting point for many performance plans implemented by various states.

^{44/} Colorado, however, withdrew from participating in the ROC during the remedies stage, and subsequently hired a "special master" to hear all the arguments and develop a remedy plan based on the performance standards and measures developed by the ROC. *See generally Colorado Remedies Report.*

^{45/} Docket No. 000121-TP, *Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies*, Final Order Requiring Performance Assessment Plan, Order No. PSC-01-1819-FOF-TP (Fla. P.S.C. Sept. 10, 2001) ("*Florida Performance Plan*").

the BellSouth region also have tailored performance plans, often at the prompting of BellSouth, to the specific needs of each state in the region.

In short, virtually all of the states -- and certainly the most populous states -- have implemented or are well along in developing performance measurements, standards, and reporting requirements that monitor and analyze the ILECs' performance in providing UNEs and interconnection facilities.^{46/} While the state performance plans vary across the country with the inclusion of state-specific components, the state plans are largely uniform (or nearly so) in the key measures, standards, definitions, and associated business rules across entire ILEC regions, particularly where there was regional collaboration.^{47/} To the extent variations exist within a particular ILEC region, it is generally attributable to state-specific considerations or an accommodation of concerns raised by the ILEC or CLECs.^{48/}

^{46/} In fact, performance monitoring and reporting is nothing new for ILECs. In many states, incumbents were required to measure their service performance and to report such information to state regulatory agencies even prior to the implementation of the 1996 Act. Notably, Verizon was subject to a performance-based incentive plan approved in 1992 and a performance regulation plan approved in 1995 and again in 2000 that required it to achieve service quality improvements and pay penalties when targets were not met. *See* Case 01-C-0440, *Petition of the Communications Workers of America's (CWA) Allegations that Verizon New York Inc. Engages in and Requires CWA's Members to Engage in Improper Practices*, Order Adopting Report at 8 (N.Y. P.S.C. Mar. 28, 2001) (citing to past performance plans for Verizon in New York). Likewise, in Connecticut, the Department of Public Utility Control has also historically imposed reporting requirements on SNET to ensure service quality. *See* Docket No. 94-10-04, *DPUC Investigation into Participative Architecture Issues*, Decision at 57-61 (Conn. D.P.U.C. Aug. 7, 1996).

^{47/} The ROC outputs apply throughout the Qwest region, except for Arizona and Colorado. In other regions, uniformity has resulted from the willingness of various commissions from smaller states to model their metrics after those developed by other commissions (e.g., New York and Texas) that had greater resources and greater willingness to take a leadership role. *See, e.g.,* Glenn Bischoff, *A Work in Progress; FCC Tries to Make the Section 271 Filing Process Less Arduous*, TELEPHONY, Apr. 2, 2001 (Verizon supports "piggybacking" of one state's data to another).

^{48/} For example, in Texas, SBC sought and obtained a remedy plan that was based on the number of transactions in a failed submeasure. However, in California, when SBC sought to obtain the same remedy plan, the CLEC position opposing such a plan prevailed. Another

For the most part, the state commissions have, or will soon have, implemented most of the key aspects that CLECs consider important and the basic structure of the performance measurements addressed in the *Notice*. This includes performance measures, performance standards, statistical analysis, reporting requirements, periodic reviews, and audits.

State plans generally incorporate measurements -- for pre-ordering, ordering, provisioning, maintenance and repair, and billing of ILEC services -- that have both parity and benchmark standards.^{49/} Measurements and standards provide reliable and usable information about how ILECs treat their competitors. For the most part, the state plans apply statistical analysis to measures where parity is the standard.^{50/} Such analysis is intended to account for measurement variability while controlling the risk of drawing inappropriate conclusions. Statistical analysis is not applicable to benchmark standards, however, because such application would provide ILECs with inappropriate room to fail without consequence.^{51/}

Most state plans also require ILECs to disaggregate the data they collect and report and to limit permissible exclusions when the ILECs calculate their performance results.^{52/} Requiring data disaggregation (*e.g.*, at reasonable product and geographic dimensions) and limiting data

provision of performance plans that varies from state to state is limitations on liability. ILECs have proposed and obtained limitations varying from 36% to 39% of their net revenue. Most state performance plans also include some application of statistical procedures, but the Colorado plan contains no such procedures. *See Texas Performance Plan, California Draft Performance Plan, Massachusetts Performance Plan, Rhode Island Performance Plan*, and Docket No. 01I-041T, *Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Colorado Performance Assurance Plan (Colo. P.U.C. Sept. 26, 2001) (“Colorado Performance Plan”).

^{49/} *See California Interim Opinion, ICC Staff Brief, Colorado Performance Plan, Massachusetts Performance Plan.*

^{50/} *See California Interim Opinion, New York Performance Plan, Massachusetts Performance Plan, but see Colorado Performance Plan.*

^{51/} *Cf. ICC Staff Brief at 8; California Interim Opinion at 144.*

^{52/} *See, e.g., Florida Performance Plan at 33.*

exclusions assure proper detection of ILEC performance failures, minimize ILEC opportunities to manipulate performance results, and provide regulators with the necessary information to attach appropriate consequences to failures.^{53/}

The state plans have also addressed the need for frequent, timely, and detailed reporting.^{54/} This is needed so that performance failures can be detected promptly and so that state regulators have the opportunity to rectify damage to emerging competitors and prevent future harm to the competitive market. In addition, the states generally require ILECs to report results for the ILEC, individual CLECs (but only to that CLEC), and aggregate CLEC data, so that appropriate and necessary comparisons can be made.

State plans often provide for periodic review of the measurements and standards, with the opportunity for revisions. For example, some states have reviews every six months, while others

^{53/} Regulators have frequently recognized the value of requiring ILECs to provide disaggregated performance data. *See Application by Bell Atlantic NY for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of NY*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd. 3953, ¶ 438 (1999) (“*New York 271 Order*”) (noting that the clearly articulated definitions of each metric in the New York Performance Assurance Plan will help ensure that the reporting will “detect and correct any degradation of service” (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd. at 20806)); *Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in New York*, Evaluation of the United States Department of Justice, CC Docket No. 99-295 at 15-16 n.29 (Nov. 1, 1999) (“*DOJ New York 271 Evaluation*”) (emphasizing the “need for appropriate disaggregation so that poor performance in one area is not masked by aggregation”); *OSS Notice*, ¶ 46 (noting the Commission’s recognition that “some level of disaggregation is necessary to ensure the collection of meaningful results”).

^{54/} *See, e.g., Massachusetts Performance Plan* at 9 (requiring performance reporting on a monthly basis); *Filing of Nevada Bell Telephone Company for Approval of its Plan for the Reporting and Auditing of Performance Measures and a Plan for Establishing Performance Incentives*, Stipulations of the Parties, Docket No. 01-1048 at 72 (submitted June 5, 2001) (“*Nevada Performance Stipulation*”) (same). In fact, monthly reporting is the norm throughout the country.

conduct reviews annually.^{55/} The states also have recognized the need to audit the data reported by the ILECs.^{56/} Audits reveal errors in performance reporting calculations and thus unreported failures. In addition, they can indicate when there are problems with ILEC data retention.^{57/} Retaining data for specific periods of time is also a requirement incorporated into most state plans.^{58/} In sum, the states have gone a long way toward addressing the issues that the Commission raised in the *Notice*, and their efforts provide a sound foundation for strong federal enforcement.

One of the major advantages of the state plans is that they already exist and are operational. The states' performance plans have taken months, and in some cases years, to develop. In contrast to the Commission, the states now have the benefit of several years of hands-on experience with these issues. Another advantage of relying on the expertise developed by the states is that the Commission can minimize the regulatory burdens on ILECs and

^{55/} See, e.g., *Colorado Performance Plan* (provides for six-month reviews of the Colorado Performance Assurance Plan ("PAP") and comprehensive reviews of the PAP after 2 ½ and 5 ½ years); *Florida Performance Plan* (provides for six-month reviews during first two years of the plan and an annual review thereafter at the discretion of the Florida PSC); *Texas Performance Plan* (provides for reviews every six months).

^{56/} See, e.g., *Florida Performance Plan* (provides for an annual audit during first five years of the plan with costs to be borne by BellSouth); *Massachusetts Performance Plan* (provides for an annual audit to be paid for by Verizon).

^{57/} For example, KPMG audits of SBC's performance data recently revealed inaccurate calculations, problems with data retention, and other failures. See Ameritech Illinois OSS Test, September 2001 Monthly Report for the Illinois Commerce Commission at 6-8 (Oct. 5, 2001); Ameritech Illinois OSS Test, October 2001 Monthly Report for the Illinois Commerce Commission at 20 (Nov. 1, 2001); Ameritech Illinois OSS Test, November 2001 Monthly Report for the Illinois Commerce Commission at 22, 25-26 (Dec. 3, 2001).

^{58/} See, e.g., *Florida Performance Plan* (requiring retention of raw data for 18 months and retention of monthly reports for three years); *Nevada Performance Stipulation* (requiring retention of raw data for 24 months); *Iowa Performance Plan* (requiring retention of raw data for three years).

CLECs^{59/} and focus its efforts where they are needed most -- to supplement and strengthen the states' enforcement regimes through the implementation of meaningful federal penalties.

III. THE COMMISSION SHOULD BUILD ON EXISTING STATE PERFORMANCE MEASUREMENT SYSTEMS BY CRAFTING A FEDERAL REGIME OF MEANINGFUL PENALTIES FOCUSED ON A SUBSET OF KEY STATE MEASUREMENTS.

A. Existing Remedies Are Inadequate To Ensure ILEC Compliance with the 1996 Act; More Severe Penalties Are Required.

In recent years, the ILECs have paid literally hundreds of millions of dollars in fines.^{60/} Nonetheless, in many respects, their performance in meeting their statutory obligations remains deficient. Apparently, these fines appear to be an annoyance rather than a deterrent -- they are viewed as little more than a routine cost of doing business.^{61/} Tellingly, when these paltry fines

^{59/} This approach meets the Commission's deregulatory goals. *See Notice*, ¶¶ 3, 4, 7, 15-20.

^{60/} *See, e.g.,* Robert Luke, *BellSouth Hits New Snag: FCC Raises Questions About Filing to Offer Long-Distance in Ga., La.*, THE ATLANTA CONSTITUTION at 3D (Dec. 21, 2001) ("BellSouth has incurred nearly **\$40 million** in penalties levied by the Georgia Public Service Commission [in 2001] for 'poor performance in doing business with competitors'"); *Techbits*, INVESTOR'S BUSINESS DAILY at A7 (Jan. 7, 2002) (SBC has paid the federal government **\$53.5 million** in fines for failure to meet merger conditions since regulators approved SBC's merger with Ameritech Corp. in 1999); *Ameritech: Phone Company Pays More Fines*, CRAIN'S CHICAGO BUSINESS at 1 (July 23, 2001) (Ameritech paid the Illinois Commerce Commission **\$24.2 million** for failing to provide adequate service to competing phone companies from July 2000 through July 2001); *Monopoly Claim Against Bell Atlantic Corp. Is Dismissed Where No Willfulness Is Alleged*; *Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.*, NEW YORK LAW JOURNAL at 25 (Dec. 4, 2000) (In March 2000, Bell Atlantic paid the Commission "a **\$3 million** fine to end an investigation into its alleged failure to provide adequate access to local phone service competitors in New York.") (emphasis added); in addition, Bell Atlantic paid "**\$10 million** to competing local telephone service providers for injuries resulting from its misconduct in handling their orders." (emphasis added)); *Service Provider Briefs*, NETWORK WORLD at 33 (Dec. 10, 2001) (Verizon paid the federal government about **\$4 million** for failing to meet performance targets from August to November 2001); Letter from Dee May, Verizon, to Magalie Roman Salas, Secretary, FCC (Dec. 28, 2001) (Verizon voluntarily pays **\$1 million** fine for metrics missed under its merger conditions).

^{61/} Representative W.J. "Billy" Tauzin, Chairman of the House Committee on Energy and Commerce, recently lauded proposed legislation that "will increase the penalties that the FCC may impose on common carriers to a level that is far beyond just the cost of doing business." Rodney L. Pringle, *Bell Backers Support FCC Call for Bigger Bell Hammer*, COMMUNICATIONS

are compared to the annual revenues of the major ILECs, the penalties often equate to only a few minutes' worth of ILEC revenues.^{62/} The message to a businessman is clear -- it is more profitable to pay the fine than to take corrective action to comply with its statutory performance obligations.

In the final analysis, real-world experience makes it clear that more substantial incentives are required before ILECs will fully comply with the 1996 Act. Officials from many government bodies, including regulators, the Department of Justice ("DOJ"), and Congress,^{63/} recognize that the fines and forfeitures of the current magnitudes are neither deterring ILECs' anti-competitive behavior nor causing the ILECs to promptly rectify poor performance, and there is widespread recognition that more severe penalties must be imposed.^{64/}

TODAY (May 21, 2001). In addition, Commission Chairman Michael Powell reiterated the need for the reform: "We recognized quickly that much of the authority that we had in this area was inadequate. The level of fines we could impose in many cases was paltry. For many large carriers the penalties could be absorbed as the cost of doing business." FCC Chairman Michael K. Powell, Remarks at the Association for Local Telecommunications Services, at 3 (Nov. 30, 2001).

^{62/} For example, on October 16, 2001, the Commission issued a Notice of Apparent Liability against SBC in the amount of \$2.5 million, citing serious misconduct including efforts to obstruct FCC investigation of supporting affidavits for SBC's 271 application in Kansas and Oklahoma. *SBC Communications Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-IH-0339, NAL Acct. No. 200132080059 (Oct. 16, 2001). At the time, SBC's revenues for the preceding quarter were \$13.5 billion, or over \$103,000 per minute. A forfeiture of \$2.5 million therefore amounted to approximately 24 minutes' worth of revenues.

^{63/} Indeed, just last week Congressional Representatives expressed concerned "that the ILECs have not taken all of their obligations under the Telecommunications Act of 1996 seriously" and that "American consumers are suffering as a result." Letter from Representatives Largent, Stupak, Cannon, Eshoo, McCarthy, and Pitts, to Michael K. Powell, Chairman, FCC (Jan. 16, 2001 [sic]). Moreover, they note that "without better enforcement of the Act, we may soon regress to the days of monopoly telecommunications." *Id.*

^{64/} See, e.g., Application by Verizon Pennsylvania Inc. et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, Evaluation of the United States Department of Justice, CC Docket 01-138 at 16-17 (July 26, 2001) ("DOJ Pennsylvania 271 Evaluation") (explaining that the Pennsylvania Performance Assurance Plan ("PAP") may not impose

While many states have made significant efforts to implement workable remedies plans,^{65/} unfortunately most state plans incorporate capping and other mitigation provisions that prevent consequences from reaching levels that are financially significant to ILECs.^{66/} As a result, most state remedies provisions are not deterring anticompetitive ILEC performance in provisioning of UNEs and interconnection facilities. Moreover, the influence that a single state (especially smaller states) can exert on a giant multi-state ILEC is limited.^{67/}

sufficient penalties to prevent harm to competition in Pennsylvania and encouraging the Pennsylvania Public Utility Commission to improve PAP penalties); *Powell 5/4 Letter* (stating that the forfeiture amount under 47 U.S.C. § 503(b)(2)(B) “is insufficient to punish and to deter violations in many instances” and urging Congress to “consider increasing the forfeiture amount to at least \$10 million in order to enhance the deterrent effect of Commission fines.”); Testimony of Leon Jacobs, Chairman, Florida Public Service Commission, before the House of Representatives Committee on Energy and Commerce, on H.R. 1765 (May 17, 2001) (supporting the “goal of increasing the penalties at the national level against companies found violating the FCC’s rules and orders” and noting that the “current level of penalties is not adequate in removing the incentives to violate current law.”); Hearing before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, 107th Congress, First Session, on H.R. 1765 at 3 (May 17, 2001) (Representative Markey stating that “[i]t is very clear that the current forfeitures and penalties available to the Federal Communications Commission are woefully inadequate to act as a deterrent to multi-billion dollar enterprises”). *See also*, H.R. 1765, 107th Congress (2001) (a bill that would increase penalties for common carrier violations of the Communications Act of 1934, particularly an increase in forfeiture penalties to \$1,000,000 per violation with a cap of \$10,000,000 for continuing violations). While AT&T supports efforts to raise the forfeiture amount to which ILECs may be subject, the Commission should aggressively use its existing authority to assure the ILECs comply with their legal obligations.

^{65/} Certain states have created performance plans that incorporate remedies to carriers and additional imposition of market incentive penalties. These plans have shown that the combined remedies and penalties approach has the potential to establish the appropriate performance incentive.

^{66/} To a great extent, the limiting provisions were a result of what, in hindsight, was undue caution. Sufficient market experience demonstrating that the ILECs prefer to pay penalties rather than correct deficient performance is now available to warrant substantial strengthening of consequence provisions.

^{67/} In addition, the chair of the North Carolina Public Utilities Commission recently acknowledged that most state regulators do not have a “lot of experience with enforcement actions.” *Antitrust Chief Details Hurdles for Merger Opponents; Policy-Makers Eye Spectrum, Broadband Challenges*, TR DAILY (Dec. 17, 2001).

Capping provisions -- largely advocated by the ILECs -- limit the maximum amount that an ILEC may be fined, no matter how bad the ILEC's performance. Absolute caps establish a preset maximum amount that an ILEC may be required to pay each month.^{68/} If the ILEC's liability exceeds that amount, the ILEC only pays up to the preset amount -- regardless of how many different performance standards are violated. Absolute caps send the signal that, once an ILEC's performance deteriorates to the level of the absolute cap, further deterioration is irrelevant because it costs the ILEC nothing additional.^{69/} In such case, the ILEC can perform a simple cost/benefit analysis, balancing the cost of market share retention against the cost of non-compliant performance. In such cases, it will make the rational choice to pay fines (and provide

^{68/} The limited liability to which ILECs are subject under absolute caps is even further limited when excessive use of "caps within caps" or "nesting" is included in remedies plans. These devices can seriously dilute the amount that an ILEC must pay for a failure of any particular performance measure, because it effectively reduces the caps on an ILEC's liability. Thus, for example, these mechanisms could allow an ILEC to fail each and every performance standard without incurring a liability anywhere near the sum of the potential liability that would otherwise apply for all of the individual violations.

Unfortunately, both the *New York Performance Plan* and the *Texas Performance Plan* include these types of limits. In New York, a "top-down" approach is applied -- a total dollar amount at risk is established and then continually subdivided into smaller caps for the months in the year, the modes of entry into the local market, critical measures, and further categories. In Texas, a "bottom-up" approach is applied -- submeasures are defined, tested for failure, and payments are made up to a limit for each failure according to the number of transactions in the submeasure (*i.e.*, per occurrence). Thus, in a "bottom-up" approach the consequence is capped by the total number of transactions times a specified per transaction amount as well as by an overall cap amount, whichever amount is reached first.

^{69/} An alternative to absolute caps (and subcaps) is the use of procedural caps. Procedural caps establish a preset level at which an ILEC can seek regulatory review of the consequences that are due. However, these caps do not automatically absolve an ILEC of liability for poor performance. If an ILEC has paid the preset amount of a procedural cap for one month, any excess liability would be placed in an escrow account, earning interest, pending the regulator's decision on whether any excess liability over the procedural cap should be paid. To the extent any caps are employed in a federal remedies plan, they should be procedural and should not be triggered until a meaningful level of consequences has been assessed. In addition, such caps should be based on a rolling twelve-month period, not to individual months, and they should be proportionate to the size of the local market at issue (*i.e.*, the estimated dollar amount that the ILEC stands to retain in monopoly-based revenues).

unlawfully poor performance) until they exceed the value of the market share it would retain because of such poor performance. Therefore, the consequences of failed performance must be sufficiently large that the ILEC would seek to provide compliant performance in order to avoid the consequences. Arbitrary limits on an ILEC's exposure through application of absolute caps thus defeat the purpose of the entire enforcement regime.

Another means by which the consequences implicit in remedy plans are diluted is the inappropriate use of so-called K tables, dead-bands, or their equivalents, which allow ILECs to exclude certain failed tests from the list of failures eligible for remedies.^{70/} Although the application of these exclusions to remedies is a well-intentioned effort by many states, such attempts to mitigate the possible effects of random variation are based on flawed application of statistical methodology. The result is many ILEC deficiencies to go unpenalized.^{71/}

^{70/} A critical factor to AT&T's proposed federal enforcement plan, and one that states have not implemented uniformly, is the statistical model that balances the effects of random variation errors. As discussed below, unifying the analytical procedures employed by the states to establish a performance failure would be beneficial. *See infra* n.78.

^{71/} K exclusions, found in the Texas performance plan, represent the number of non-compliant submeasures that are allowable before a consequence payment is applicable. Essentially, they allow the ILEC to take another bite at the apple, over and above the agreed-upon, acceptable level of error. Notably, the staff of the Illinois Commerce Commission ("ICC") has recommended that the ICC reject the use of K tables or exclusions because such tables would apply a five percent forgiveness factor to penalties that Ameritech would owe. *See Petition for Resolution of Disputed Issues Pursuant to Condition 30 of the SBC/Ameritech Merger Order*, Brief of the Illinois Commerce Commission, Docket No. 01-0120 at 7, 15-16, and 18 (Sept. 27, 2001) ("*ICC Staff Brief*"). In fact, a 60% reduction in remedies owed by an ILEC due to the application of K exclusions is not beyond the realm of possibility.

Like K exclusions, a dead-band provision mitigates the effect of statistical errors resulting from random variation, allowing a number of failed submeasures to result in no consequence payment by the ILEC. Dead-band provisions are applied under the New York performance plan.

B. The Commission Should Use its Powers Aggressively To Enforce Compliance with State Performance Standards, Building on State Processes and Expanding the State Penalty Amounts.

While there is no basis for the Commission to pursue an approach that may water down the performance measurements, standards, and reporting requirements established by the states, there is -- in sharp contrast -- considerable value in using the Commission's enforcement powers to buttress the states' efforts to compel the ILECs to comply with their nondiscrimination obligations. Indeed, the future of competition depends in significant part upon the Commission's willingness to wield its enforcement powers to provide significant disincentives for inadequate and discriminatory performance.

With minimal effort, the Commission can build on the states' performance and remedies plans, calculating and applying effective remedies designed to make it more costly for ILECs to violate the 1996 Act than to comply with it. The federal remedy plan AT&T proposes is a supplement to the second tier (the market incentive tier) of the two-tiered remedy plans that most states have adopted.^{72/} As the Commission knows from its review of Section 271 applications, most state plans encompass both compensation to injured carriers (Tier 1)^{73/} and penalty

^{72/} See, e.g., *California Draft Performance Plan* (providing for compensatory Tier 1 payments to CLECs and penalty Tier 2 payments to either a public fund or to ratepayers); *Colorado Performance Plan* (providing for a two-level Tier 1 remedies with compensatory bill credits to CLECs and penalty payments to a special fund; also providing for Tier 2 payments to a public fund); *Florida Performance Plan* (providing for Tier 1 payments to CLECs and Tier 2 payments to a public fund); *Iowa Performance Plan* (noting the ROC plan provides for compensatory Tier 1 credits and penalty Tier 2 payments).

^{73/} For the most part, compensation to injured carriers is a matter dealt with in state proceedings and is often incorporated into individual carrier interconnection agreements. While Tier 1 remedies are valuable for (at least theoretically) making CLECs whole, these remedies have no motivational power to cause the significant ILEC behavioral changes that are needed. Compensatory damages are limited to the CLEC's direct damages resulting from the ILEC's failure to perform and do not reflect the indirect costs of a carrier's inability to gain market share. AT&T does not propose that the Commission distract either itself or the industry in reviewing state-prescribed compensatory damage provisions.

payments to a state public fund to deter future non-compliance (*i.e.*, market incentives) (Tier 2).^{74/} Importantly, the remedies assessed under the proposed federal plan must be in addition to those assessed by the states, although any payments an ILEC makes to a state or other public fund under Tier 2 of a state remedies plan could be treated as an offset against payments owed under the federal plan.^{75/} In effect, the federal penalties should result in the ILEC reaching any procedural maximum more rapidly.^{76/} In addition, in cases in which there is evidence that an ILEC has failed to meet performance standards in multiple states, the Commission should consider applying additional penalties and/or permit faster escalation of consequences to the maximum levels.

The logistics of the proposed federal plan are simple. The ILEC would provide the Commission with the data it reports in each state for the state versions of limited measures that are adopted as the foundation of the federal enforcement plan. When an ILEC's state report identifies a performance failure, it should also identify whether the failure is severe and whether the failure is prolonged (*i.e.*, generally for three or more months) and the amount of the state fine

^{74/} Tier 2 remedies are based on an ILEC's overall consequences for performance in serving CLECs. Because the focus is on injury to competition, not individual competitors, and the purpose is to change behavior, not compensate for injury, Tier 2 remedies are paid to the government.

^{75/} A dual state and federal remedy system is not novel, even for failure of the same performance criteria. The Commission and the states can -- and do -- assess penalties for an ILEC's failure to comply with a merger condition, even the same merger condition.

^{76/} This is especially important in states where a BOC has received Section 271 relief and the overall anticompetitive effects of its discriminatory performance are magnified. Moreover, in such states, the BOC has (theoretically) demonstrated that it can deliver the quality of service required by law. Accordingly, in states where a BOC has obtained section 271 approval, it should be required to pay any 271-related penalties in addition to those under the basic federal penalty plan.

assessed.^{77/} Using this information, a federal performance penalty can be calculated and assessed on a per performance failure, per month basis, by state for each failed measure.^{78/} The necessary calculations to determine such amounts are straightforward and can be made on a personal computer.

As noted above, the federal Tier 2 penalty should take into account two key variables: whether the performance failure is severe and whether it is chronic. Virtually all state performance plans generally recognize that, for any given measure, more severe penalties should attach to performance that significantly misses a benchmark or significantly departs from parity than to performance that falls just a little short of the mark. They also recognize that chronic performance failures (generally those that occur for three or more consecutive months) should generate increased penalties until the applicable performance standard is met. All of these data are available and can easily be provided to the Commission together with the ILEC's state performance plan results. A simple equation can then be used to calculate a specific basic penalty amount. If the ILEC failure is severe or chronic (*i.e.*, recurring), the penalties should be

^{77/} Given that capping may serve to reduce the total consequence due in the state, the fine generated by an individual metric might not be the effective amount paid. Therefore, the ILEC should report the ratio of the actual fine to the uncapped calculated amount. This ratio would then be used to scale the amount of the fine paid, at the state level, for a particular failing metric result.

^{78/} One of the most difficult issues the states have had to deal with is the proper methodology to use to determine whether there is a performance failure for parity measures. This should involve the routine application of even-handed statistical procedures. Although uniformity across states should be possible in this regard, it does not now exist. As a result, it would be appropriate for the Commission to establish uniformity in this aspect of performance measurement monitoring. AT&T recommends use of a simplified version of the computation proposed in the Louisiana Statistician's Report, in which a z-test governed by a balancing critical value is computed at the submeasure level. *See Second Application by BellSouth Corp. et al., for Provision of In-Region, InterLATA Services in Louisiana*, Brief in Support of Second Application by BellSouth, CC Docket No. 98-121 (filed July 9, 1998). This issue should not arise, of course, for benchmark (fixed) performance standards, because there is no need to use statistics to test for random error. Rather, comparison of performance results against a bright line test is sufficient in such cases.

greater. Finally, if a Bell Operating Company (“BOC”) has been granted section 271 approval in the state, a third variable should be brought into play: violations by a BOC with interLATA authority for the state should trigger a higher base fine (which should also be scaled upwards to reflect severe and/or chronic failures) and/or the procedural cap should expand to include intrastate and interstate long distance revenues and intrastate and interstate switched access revenues.

The Commission should not view consequence caps as necessary but if it determines some limitation is appropriate, it should only apply the procedural cap in AT&T’s proposed federal enforcement plan, basing such a cap on the New York experience.^{79/} This would lead to a procedural cap at 40 percent of ARMIS local revenues, per ILEC per state, with any Tier II penalties applied at the state level considered when determining if the cap has been reached.

The federal plan should also address other administrative issues, such as penalties for tardy reports, sanctions for incomplete reports, consequences for failures to provide access to customer-specific data, interest on tardy consequence payments, and reports for exclusions ILECs take on data measured.^{80/}

A necessary step in establishing a federal incentive/penalty regime is to determine which subset of the performance standards established by the states should be subject to the federal Tier 2 penalties. AT&T proposes that the Commission direct the CLEC industry to submit a

^{79/} See Cases 00-C-0008, 00-C-0009, 99-C-0949, *Complaint of MCI WorldCom, Inc. against Bell Atlantic-New York Concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers, filed in C 99-C-1529, et al.*, Order Directing Market Adjustments and Amending Performance Assurance Plan at 4 (issued Mar. 23, 2000) (adding \$24 million in dollars at risk to the New York Performance Plan, raising Verizon’s liability cap from \$269 million, or 36% of Verizon’s ARMIS net return, to \$293 million, or 39% of Verizon’s ARMIS net return); *New York 271 Order*, ¶ 436.

^{80/} State plans already include provisions to protect ILECs from having to pay penalties on events that are truly beyond their control.

consensus proposal of the submeasures to be used,^{81/} working with guidance from the Commission regarding the approximate number of metrics the Commission would be willing to include in its consequence system. Such input could be promptly supplied. Naturally, over time, the list of submeasures subject to the federal performance plan should be adapted in light of experience and competitive need. At all times, the most competition-affecting areas of performance should be those subject to the federal penalties regime.

Finally, the federal penalty plan should be as self-executing as possible. Because the ILECs will supply all the necessary inputs describing their own performance and consequences paid, the lag between the Commission's receipt of this summary data and the payment of federal consequences should be minimal. This is important, because the expectation of imminent (as opposed to distant) consequences will have the most effect on the ILECs' business judgments and performance. Moreover, the state standards and procedures that the Commission will rely on will be ones that were developed in state proceedings where the ILECs' due process rights were fully protected. In addition, the current rulemaking also provides the ILECs with a full opportunity to be heard on the incremental features of the federal plan. And critically, all fines and forfeitures will be based on the ILECs' own self-reported data, from their own systems, which the Commission presumes are reliable.^{82/} Accordingly, no additional process should be

^{81/} The ILECs' views should be given little weight in determining which measures are to be included in the federal enforcement plan, because their natural incentives will drive them to favor measures that tend to limit their potential liability rather than measures that have the most effect on competition. CLECs, by contrast, would inevitably focus on the latter, which is precisely what is needed.

^{82/} See Notice, ¶ 22.

necessary, and the ILECs' payment obligation should arise directly as a result of each reported failure as to each designated metric.^{83/}

C. Limited Clarification of State Performance Plans Is Needed To Establish a Meaningful System of Consequences.

Although practically workable, the state performance monitoring regimes are not perfect. One area where the Commission should make useful improvement is in the benchmark performance standard for "hot cuts." Although the Commission had stated that it seeks to encourage facilities-based competition, it is clear that such competition is not developing at the anticipated pace. That is because, in the vast majority of cases, CLECs remain dependent upon elements of the ILEC network, even when they are prepared to combine elements of that network with their own network facilities to provide service. And critically, the current standard for acceptable transitioning of retail customers to competitive networks is inadequate. This is due, in significant part, to the fact that the some of the performance standards established by the states are not sufficient to support meaningful competition.^{84/}

CLECs that attempt to compete using a combination of their own network facilities and ILEC-supplied loops generally require the ILEC to transfer the loop using a "hot cut." As explained in the attached Declaration of John Szczepanski ("Szczepanski Decl."), that process requires the ILEC to disconnect the customer's physical loop from the ILEC's switch and

^{83/} See 47 U.S.C. § 503(b)(3)(A). If the Commission determines that issuance of a formal notice of apparent liability should be a precondition to collection of a forfeiture, the issuance of such notices should be a formality and only the briefest of intervals should be allowed for responding. Moreover, since the performance measures themselves allow for appropriate exceptions, the forfeiture amounts are readily calculable, and the entire plan operates in reliance on the ILECs' own self-reported data, the scope of legitimate ILEC excuses (if any) should be extremely narrow.

^{84/} The costs of moving customers and the limited ILEC capacity to handle hot cut transitions are also critical factors that inhibit facilities-based competition. Those factors, however, are not under consideration in this proceeding.

reconnect it to an AT&T facility that carries the signal to the AT&T switch. It also requires that this disconnection and reconnection activity be coordinated with software changes on the ILEC and AT&T switches and in the Number Portability Accounts Center, which handles the porting of telephone numbers. If these transitional activities are not performed perfectly, the customer loses service.^{85/} Critically, outages in connection with hot cuts have occurred far too frequently to meet customer expectations. Such disruptions -- and even customers' fears that they may incur such disruptions -- severely chill competition.^{86/}

AT&T urges the Commission to address this significant problem by adopting a performance standard that meets *customers'* needs and is not simply based on an abstract notion of "acceptable" performance. Marketplace evidence confirms that UNE Loop ("UNE-L") market entry is lagging.^{87/} Indeed, if the Commission's hopes for facilities-based competition are ever to bear fruit, the standards for transitioning customers who are served by competitors' switches cannot be less than the standards that apply to customers of carriers who use the ILEC's switch. Otherwise, UNE-L-based competition can never be successful and competitors seeking to use that entry mode will not have a meaningful opportunity to compete.^{88/}

Unlike many other performance standards established by the states, market evidence now shows that the hot cut standard is not sufficient. Thus, AT&T urges the Commission to address performance problems for hot cuts by adopting national performance standards necessary to

^{85/} See, e.g., *New York 271 Order*, ¶¶ 291 n.925, 299; *Texas 271 Order*, ¶¶ 251 n.708, 256; Evaluation of the United States Department of Justice, CC Docket No. 99-295 at 18 (Nov. 1, 1999) ("Reliable performance in completing hot cuts correctly and at the time scheduled is extremely important because of the risk to the customer of losing dial tone for more than a brief period").

^{86/} Szczepanski Decl., ¶ 11.

^{87/} Szczepanski Decl., ¶ 11.

^{88/} See *Local Competition Order*, ¶ 378.

minimize the risk of customer disruptions,^{89/} and thereby assure that facilities-based CLECs have what the Commission has long recognized to be what the law requires: a “meaningful opportunity to compete.”^{90/}

As explained above, performance standards are mapped into one of two classes: (1) those for which the standard is parity with an analogous ILEC retail service, and (2) those for which the performance standard is an absolute level of required performance (otherwise known as a benchmark). For hot cuts, regulators have found that no retail analog to an ILEC service exists because ILECs only initiate hot cuts for competitors, not their retail customers.^{91/} Thus, a benchmark standard is used. When a benchmark serves as the performance standard, an absolute minimally acceptable level performance must be specified. Measured performance is then compared to this minimum standard.^{92/} It is imperative that the standard be set at a level that permits competition to develop.

State commissions have recognized the importance of developing hot cut performance measurements. Unfortunately, at the time they generally set the performance standards for hot cuts, they lacked insight into the high value the market attributed to quality performance in that

^{89/} Szczepanski Decl., ¶ 16.

^{90/} See *Local Competition Order*, ¶ 27. Even then, the potential for true facilities-based competition will not be unleashed unless the ILECs deliver a conversion process that not only is fast and non-disruptive but also does not apply nonrecurring charges that render the migration to an alternative network financially prohibitive.

^{91/} ILECs, unlike CLECs, have almost 200 million customer connections hardwired to their local switches. This hardwiring exists not only for customers with active service but also for customers who were previously served by the ILEC but elected to discontinue the service. In such cases service is generally interrupted by software telling the switch to effectively ignore the line termination although the line remains physically tied to the ILEC switch.

^{92/} This comparison is a pass-fail comparison -- whether the computed result is equal to or better than the standard. If the answer is “yes,” the performance passes. The comparison does not involve statistical techniques that, if applied, would be unnecessarily complex and also would make the standard even more tolerant of marginal performance. See *supra* Section IV.A.

area. Now, however, there is ample market evidence that UNE-L competition -- the competitive entry vehicle uniquely affected by hot cuts -- is not developing rapidly. Moreover, the current permissive state standards are generally not the result of informed judgment based upon market imperatives. Rather, they tend to reflect adoption of a de facto standard promulgated by the Commission in the *New York 271 Order* without much more than a passing examination.^{93/}

Thus, the Commission should make tangible its expressed commitment to facilities-based competition.^{94/} In particular, it should start by reevaluating the adequacy of hot cut performance minimums, the need for more exacting standards, and the benefits that can be obtained by putting CLECs and ILECs on more equal footing with respect to customer experiences in the earliest stages of account acquisition -- when first impressions are lasting and highly influential to a customer's openness to ILEC alternatives. Both the Commission and the DOJ have already recognized that when hot cuts are not provisioned properly, their competitors' would-be customers lose service.^{95/} Facilities-based competition will be smothered if customers are unwilling to change providers for fear of losing service. AT&T therefore recommends that the Commission adopt a federal hot cut performance standard of 98% on time with a dial tone interruption rate of under 1%.^{96/}

^{93/} See *New York 271 Order*, ¶¶ 292-298. The Commission was not explicitly investigating the reasonableness of the hot cut standards. Rather, the Commission could only conclude that the existing evidence did not demonstrate that the state standard was inadequate. However, the passage of time and the obvious languishing of facilities-based competition -- competition that not only the Commission but the ILECs have sought to promote -- convincingly demonstrates that a more rigorous, competition-invigorating standard is required.

^{94/} Notice, ¶ 5; *Triennial UNE Notice*, ¶ 3; "Digital Broadband Migration" Part II, Statement of Michael K. Powell, Chairman, Federal Communications Commission at 4 (Oct. 23, 2001) (FCC must provide incentives for competitors to use their own facilities).

^{95/} See *supra* n.85.

^{96/} Szczepanski Decl., ¶ 16.

D. The Proposed Federal Enforcement Plan Should Apply Only to ILECs.

AT&T recognizes that there are ILECs of different sizes. Moreover, because an ILEC's ability to affect competition generally is in part a function of its size, the need for performance standards, measures, and reporting requirements may reasonably vary by carrier size. In this regard, the Commission should look to Section 251(f) of the Act, which represents a determination by Congress that the differing circumstances of the smallest incumbents may warrant a lighter regulatory touch and that such decisions should be made by the state commissions.^{97/} Here, the Commission's primary enforcement concerns should be with the Tier 1 local exchange carriers, which collectively control the vast majority of all access lines.^{98/}

In sharp contrast, there is no need for the Commission to impose performance measurement or reporting requirements on competitors. In the (limited) circumstances in which a competitor has constructed its own facilities to connect a given customer, CLECs by definition lack market power. Thus, unlike the ILECs, they cannot possibly avoid customer demands for service that is at least at the same level as that offered by the ILECs, and market forces will provide the discipline needed to ensure quality performance.^{99/} Indeed, if the competitor cannot provide service that is the same or better quality than the ILEC's, its customers will not stay for

^{97/} 47 U.S.C. § 251(f) (creating separate classes for ILECs).

^{98/} Tier 1 local exchange carriers, also known as Class A LECs, are companies having annual revenues regulated telecommunications operations of \$100 million or more. Tier 1 local exchange carriers have been defined using criteria used to define Class A companies. *See* 47 C.F.R. §§ 32.11(a), (e); *see also generally Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd. 1364 (1990). Nevertheless, if a Tier II local exchange company were already subject to a state's plan for monitoring UNE performance, there would be no additional burden if that company were included in the Federal Plan. Thus, the inclusion or exclusion of ILECs should hinge on whether or not the state plan includes or excludes the particular ILEC.

^{99/} *See Fea-Taggart Decl.* at 19-20 (explaining that third-party providers often have significantly better performance at attractive prices).

long. Moreover, if public reporting of the ILECs' performance leads (as it should) to higher quality ILEC performance, market forces will require competitors to raise their standards as well.

In any event, requiring competitors to report on their service quality does not make sense while they are still so heavily dependent on ILEC facilities and services. As described above, a very large proportion of CLECs' local exchange service is provided through the use of unbundled network elements obtained from ILECs or by resale of ILEC retail services.^{100/} Accordingly, as the Commission and many state commissions recognize, a competitive carrier often has "no control over the service quality of the resold service or the purchased elements."^{101/}

IV. THE COMMISSION NEED NOT CONCERN ITSELF WITH "BURDENS" ON ILECS OR SUNSETTING PROVISIONS.

A. Requiring Compliance with Performance Measures and Standards Is Not a Burden.

The *Notice* reflects excessive solicitude for supposed burdens on ILECs that might result from the use and enforcement of performance standards. Indeed, it expresses concern about the possibility of placing additional "regulatory" burdens on ILECs at least 35 times.^{102/} As described in detail above, however, the Commission's principal duty is to promote competition, and deregulation is only a rational policy once competition has been fully established.

^{100/} Because the CLEC is often so reliant upon the services obtained from the ILEC, monitoring and reporting by the CLEC would bring with it the substantial complexity of determining which failures were due to non-performance by the CLEC and which were due to an inability of the CLEC to recover from a performance failure on the part of the ILEC.

^{101/} 2000 Biennial Regulatory Review -- Telecommunications Service Quality Reporting Requirements, Notice of Proposed Rulemaking, CC Docket No. 00-229, 15 FCC Rcd. 22113, ¶ 32 (2000); see also Comments of the Indiana Utility Regulatory Commission at 3 (Jan. 12, 2001) ("customers have no way of knowing how the underlying network is configured and who is truly to blame for the service problems"), and Comments of the Michigan Public Service Commission at 4 (Jan. 12, 2001) ("[r]esellers and competitors that purchase network elements from an incumbent IEC may have no control over the service quality of the resold service or the purchased elements").

^{102/} See, e.g., *Notice*, ¶¶ 7, 15-20, 26, 34.

In any event, performance measures and standards are not burdensome. Data collection is mostly automated, as is the processing and reporting of performance data. And the approach proposed here minimizes the work needed by all parties -- including ILECs -- to get a federal performance regime up and running, while avoiding duplication -- or, worse, weakening -- of the states' performance plans.

Performance monitoring requirements merely emulate the operation of the competitive marketplace in a relatively non-regulatory manner.^{103/} CLECs must meet the needs of their customers, providing quality and timely products and services, or suffer the punishing consequences of lost customers and market share. That is why competitive companies carefully monitor their performance and improve service and products to prevent such losses.^{104/} In a competitive market, service providers provide appropriate performance data to their customers, and are subject to the significant consequences of a competitive market if their performance falls below acceptable commercial standards.

Yet, where competition is not established, as in the local telecommunications market, market forces do not provide the necessary impetus to monitor performance. Without the pressure of market forces, the only alternative is for regulatory authorities to use performance

^{103/} In this context, the regulator is simply protecting customers who have no practical alternative by requiring monopolists to provide information and be subject to discipline that the market cannot enforce.

^{104/} Indeed, participants in truly competitive markets are passionate about measuring the performance they deliver to their customers, particularly their largest customers, and they are motivated to sustain good performance, rectifying service problems promptly, so that they can retain those customers. Notably, CLECs are among the ILECs' largest customers. Thus, in a truly competitive market, the ILECs would value their wholesale business and partner with CLECs to improve the usefulness, quality and cost effectiveness of the UNE and interconnection functionalities that the CLECs use. Unfortunately, the ILECs appear to view degraded performance as one more tool to slow competitive market entry and reduce the utility of the limited UNE support the CLECs can practically obtain. This behavior is simply further evidence of the ILECs' unchecked local market power.

measures and standards to assess whether the ILECs -- the unwilling suppliers of crucial inputs to their CLEC customers -- are complying with their regulatory obligations and then to enforce such compliance through application of meaningful financial penalties until the market is fully competitive. The ILEC performance reports provide ILECs some incentive to sustain performance in the absence of a competitive marketplace. Therefore, it can not reasonable be deemed “regulatory” for the Commission to take actions that require ILECs to measure performance in the manner they would be required to do in a competitive market.

If ILECs perceive any burden from regulatory imposition of performance monitoring and enforcement plans, it is only because such plans make it more difficult for ILECs to violate the law. In such case, the main “burden” is that ILECs’ discriminatory performance is exposed and becomes subject to appropriate consequences. Even if the imposition of regulatory plans could be viewed as a burden, it is a burden that Congress inherently mandated until local competition is firmly established.

B. The Need for a Federal Enforcement Plan Subsidies as Competition Grows.

The goal of the state performance plans and the proposed federal enforcement plan is to spur competition. It is premature for the Commission to focus on sunset provisions of a plan that it has not yet crafted, adopted, or given any time to serve its purpose.^{105/} When ILECs demonstrate that they are regularly meeting their obligations under the 1996 Act and when competition is firmly established, there will be time enough to evaluate the means for dismantling the performance measures and remedies regime. Indeed, when (and if) those events occur, the ILECs’ market power will have sufficiently dissipated to the point that delivery of compliant performance will be necessary for the ILECs to succeed in the marketplace. That, in

^{105/} Notice, ¶¶ 77-79.

turn, will render federal (and state) consequence plans largely moot, because the ILECs will be performing consistently with their legal obligations. Thus, the only review that may be appropriate for the foreseeable future is a periodic check to assure that the measures included in the federal enforcement plan remain the ones most pertinent to support competitive entry.¹⁰⁶

¹⁰⁶ The ongoing usefulness of individual measurements is already generally accommodated by periodic state commission review of state plans.

CONCLUSION

For far too long, the ILECs have thwarted and continue to thwart the will of Congress, as articulated in the 1996 Act. Despite considerable efforts by regulators and CLECs, there is still no assurance that UNEs will be available on a just, reasonable, and non-discriminatory basis. The Commission should make it a top priority to cure these problems immediately by implementing a rigorous federal enforcement regime based principally on the performance measures and standards established by the state commissions. This is both the most effective means of enforcing the ILECs' legal requirements and the least regulatory manner in which to proceed.

Respectfully submitted,
AT&T CORP.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Performance Measurements and Standards for)	
Unbundled Network Elements and)	CC Docket No. 01-318
Interconnection)	
)	
Performance Measurements and Reporting)	
Requirements for Operations Support)	CC Docket No. 98-56
Systems, Interconnection, and Operator)	
Services and Directory Assistance)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
Petition of Association for Local)	
Telecommunications Services for Declaratory)	CC Docket Nos. 98-147, 96-98, 98-141
Ruling)	

**DECLARATION OF JOHN SCZEPANSKI
ON BEHALF OF AT&T CORP.**

QUALIFICATIONS AND PURPOSE OF TESTIMONY

1. My name is John Szczepanski. My business address is 900 Route 202/206 North, Bedminster, New Jersey 07921.

2. I am employed by AT&T Corp. ("AT&T") as a Division Manager in AT&T's Business Services organization. In this position I am responsible for oversight of AT&T's market entry for local voice services to customers in the small business market. In addition, I have participated in developing AT&T's small business market entry strategy and am involved in the effort to ensure AT&T's commercial and operational readiness to provide local telephone service for small to medium-sized business customers. I also have experience in operations, network planning, engineering, new service development, large program management and

international business. I have a Bachelor's degree from La Salle University and have been with AT&T for 30 years

3. The purpose of my declaration is to describe AT&T's small business facilities-based local entry and the kinds and quality of service that AT&T needs from each incumbent local exchange carrier ("ILEC") in order to provide commercially reasonable customer service that is necessary to compete head to head with ILEC. In addition, I will address why "hot cut"^{1/} benchmark performance standards of 90% on time delivery and 95% of installations without service interruption are inconsistent with the expectation of AT&T's customers, and therefore have a significant and potentially decisive impact on AT&T's ability to succeed in the market.

AT&T'S SMALL BUSINESS LOCAL ENTRY STRATEGY

4. The small business market is significantly different from the local market for larger business customers. Small business customers require a broad range of products, services and features, but it is not economic to serve them using digital facilities that make such services readily available. First, these customers do not require a large enough number of loops from each premise to make it economic for AT&T to serve them using DS-1 digital facilities. In addition, these customers typically cannot afford to purchase the customer premise equipment

^{1/} A "hot cut" is the coordinated migration of a customer's loop from one carrier's network to the network of another carrier. In general, the procedure involves two steps: (1) the manual transfer of the customer's physical loop, disconnecting it from the ILEC switch and reconnecting it to an AT&T facility that carries the signal to the AT&T switch; and (2) the coordinated switch software changes on the ILEC and AT&T switches and at the Number Portability Accounts Center ("NPAC"), which handles the porting of telephone numbers.

("CPE") necessary to take advantage of such digitally based services. As a result, it is only economic for both the customer and the CLEC to focus on analog services.^{2/}

5. Nevertheless, operational telephone service is essential to the day-to-day and long-term success of any small business. Any disruption in service can have a significant impact on a small business, not only at the time of outage, but long afterward. Therefore, small business customers are particularly sensitive to even the slightest risk that they might lose service for even a short time. The risk arises due to the current ILEC hot cut process. Moreover, given the high degree of churn in this market, many more hot cuts occur than are reflected in the net growth of UNE-L lines.^{3/}

6. In areas where AT&T has deployed its own switches AT&T's ultimate goal is to provide primarily *facilities-based* services to small and medium-sized businesses, leasing only loops from the ILEC. A facilities-based strategy for these business customers makes sense for a number of reasons. In particular, business customers typically require advanced features and functionality, and the deployment of our own switches helps us meet these requirements. With its own switches, AT&T can offer new and innovative services and is not limited to offerings based on the capabilities of the ILEC's switch and network. In addition, by using its own switches AT&T is able to standardize its small business offering across the country -- a factor that is desirable both for efficient marketing and customer service. Finally, such

^{2/} Thus, a carrier's ability to serve a particular customer is not determined by an arbitrary classification of the business as "small," "medium," or "large." Rather, it hinges upon whether the particular customer location can be efficiently served using a digital loop facility. This implies that the customer must direct in the range of 20 or more voice grade loops to the CLEC's service from an individual location.

^{3/} For example, if the churn rate is 50%, AT&T must have four successful hot cuts to keep two new customers.

uniformity permits greater sharing of common support processing which, given the high fixed costs of telecommunications services, is essential to generating competitive economies of scale.

7. Given these considerations, and AT&T's significant investment in local networks in many markets,^{4/} in 1999, AT&T began to consider seriously serving the small business market using AT&T switches that are connected to ILEC loops through collocations at ILEC central offices. AT&T concluded that such a business, properly operated -- and with the necessary support from ILECs -- offered a viable method to compete.

8. The fundamental factor inherent in a small business market entry plan is the enormous fixed cost commitments (including local switching equipment and collocations) that must be made before offering service, together with the monthly operational costs of providing service to the subscribers AT&T obtains after making such investments. Thus, in order to compete and survive in this market, AT&T must achieve two critical objectives: (1) it must bring its incremental costs down below the incremental revenues that are available in a fiercely competitive market; and (2) AT&T must quickly ramp up commercial sales volumes to allow it to better utilize its fixed investments. Unfortunately, in spite of AT&T's strong commitment to this plan and its expenditure of significant resources, the realities of UNE-L provisioning-- in particular the "hot cut" process and its impact on new customers -- made this strategy unworkable.

9. During 1999 and 2000, AT&T faced significant hurdles in implementing its "All in One" ("AIO") UNE-Loop ("UNE-L") based service offer. The key to UNE-L provisioning -- and its central point of risk for AT&T and the customer -- is the hot cut. Critically, the hot cut process is totally reliant on manual efforts, requires close coordination

^{4/} AT&T has made an overall non-cable investment of \$4.5 billion to support local offerings since 1999.

between carriers, and requires both carriers to perform operations at a specific time and in a specific order.^{5/} As a result, it is essential that the parties involved in a hot cut have a clear agreement on their respective responsibilities and that each party rigorously lives up to its own responsibilities. Because of these key operational imperatives, AT&T was forced to spend virtually all of 1999 and 2000, and much of 2001, attempting to obtain explicit agreements^{6/} from some ILECs on the operation of the manual hot cut process in order to reduce operational barriers to market entry, rather than focusing on acquiring customers. For example, the development of a prototype process (which occurred in New York) required a significant amount of time despite the almost daily monitoring by the New York Public Service Commission and the additional incentives to “cooperate” afforded by Bell Atlantic’s then pending 271 application for that state. And in spite of the Commission’s endorsement of the New York hot cut process in Verizon’s New York 271 decision, other ILECs held a deaf ear to AT&T’s continued requests for a detailed hot cut process and were only willing to agree to variations of the process when

^{5/} In the long distance market, unlike the local markets, care was taken to assure that customers could change among alternative long distance networks in a manner that was automated. As such, it was (and is) quick, inexpensive, accurate and not volume constrained. As a result, competition and alternative sources of service have flourished. On the other hand, in the local markets -- where the local loop remains a virtual monopoly supplied only by the CLEC’s chief competitor -- the process to move customers between networks remains essentially manual. As a result, the critical transition step of moving customers from the ILEC to a competitor is costly, unreliable and not prone to scaling needed to support a vigorously competitive market.

^{6/} Bell Atlantic (now Verizon) adopted the hot cut process for all of its existing states at the time the New York agreement was implemented in March 1999. GTE (now Verizon-West) agreed on the process in March 2000. SBC agreed on a comparable process for Texas in April 2000, but, in spite of significant negotiations, no process has been implemented in the Pacific or Ameritech regions. Bell South and AT&T entered into a Memorandum of Understanding for a hot cut process, which became effective on May 15, 2001. A similar process was implemented by Qwest in May 2001.

pressure was applied through regulatory intervention in the 271 review process or interconnection agreement arbitrations.

10. At the same time, state regulators considering performance plans and standards generally adopted the hot cut benchmark standards approved in the New York 271 decision, relying on the NYPSC's and this Commission's acceptance of the 90% on-time and <5% outage benchmark performance standards, rather than independently examining the appropriateness of those standards in the competitive market.

11. As a result of these circumstances, and in spite of AT&T's commitment to provide resources for both the marketing and provisioning of a UNE-L based entry plan, by the end of 2000, AT&T had provisioned only a modest number of access lines to small business customers nationally, primarily in New York and Texas. Of that modest number, a significant portion of the lines that customers ordered were disconnected after AT&T had made a sale but before or during the customer's transition to AT&T's network. A close examination of the reasons behind the disappointing number of lines provisioned and high rate of disconnects, including specific feedback from customers, showed that customer dissatisfaction was primarily due to provisioning delays and service disruptions at the time of conversion -- both of which were direct outgrowths of hot cut processes that were not effective even for the limited volumes that had been ordered prior to market ramp-up. Unfortunately, the negative impression left on customers who experienced such difficulties, including service outages held out as possible by our sales agents, was almost impossible to overcome.^{7/} Our analysis of this information, along

^{7/} This negative impression was further affected by customers' expectation that switching local carriers should be essentially the same as switching long distance carriers -- easy, technically flawless and undetectable. Customers learned by experience or word-of-mouth that it was not, and that the hot cut process often required multiple calls to the customer to reschedule events. Each additional contact gave the customer less confidence in AT&T's service and

with our familiarity with the small business market and customer expectations, resulted in a hard-learned conclusion: even in places where the ILEC was meeting the benchmark performance levels, those levels were simply insufficient to meet the customers' business needs.^{8/}

12. As a direct result of this analysis, at the end of 2000, AT&T's Business Services organization began to examine possible alternatives to serve the small business market. In particular, we searched for a strategy that would provide immediate relief from the risks associated with the hot cut process while still moving toward the goal of providing facilities-based service to the small business market.

13. In early 2001, AT&T developed and began to implement an alternative plan to acquire local telephone customers in a manner that minimized the potential for customer impact.^{9/} Specifically, AT&T developed a two-stage strategy. In the first stage, AT&T acquires customers using a UNE-P based approach, thereby enabling a (theoretically) transparent service transition of the customer's service to AT&T while avoiding the risk of outage. In the second stage, AT&T migrates these customers to facilities-based UNE-L service through a project

provided an opportunity for the customer to change its mind. And, at the same time, each contact served to increase AT&T's expenses.

^{8/} Moreover, assuming that the ILEC meets such minimum standards and the on-time provisioning and subsequent risk of outage are independent probabilities, then a customer has only an 85.5% (90% on-time x 95% error free) likelihood of having an uneventful provisioning experience. This implies that even when the ILEC "passes" those benchmark standards, almost 16 out of 100 customers may encounter a problem. Such odds -- and the possibility of having such experiences -- are enough to scare off all but the most committed customers.

^{9/} While the process serves to minimize the customer impacts and thereby circumvents the most egregious implications of the ILEC's current hot cut process, the approach should not be considered the ultimate solution -- particularly given the Commission's current determination not to make UNE-P practically available to small and mid-sized businesses in the largest metropolitan areas.

managed bulk conversion.^{10/} This second stage establishes the customer on the AT&T network, allowing AT&T to take advantage of prior facilities investment and furthering the Commission's goal to achieve more facility-based competition.^{11/}

14. AT&T's ability to gain and keep small business customers made a significant turnaround in 2001. Recent results indicate that AT&T was able to provision more than *five times* the lines with a customer service interruption rate that was an *order of magnitude less*. Most important, AT&T was able to provision its service at a level that approaches the higher level of consistency customers have demanded. For example, in New York, AT&T, through its contractor, migrated an appreciable number of lines from the ILEC's switch to UNE-L on a bulk conversion basis. This process, which used prescreening to identify impaired loops and prevent them from being included in a bulk cutover, generated an on-time delivery of loops in excess of 99%. And even more critically, substantially less than 1% of the conversions experienced loss of dial tone.

15. It is critical to note, however, that even though circumventing the hot cut process through use of UNE-P improves customer acceptance, it is not the ultimate solution but only a stopgap measure. First, this process requires that AT&T incur two non-recurring charges -- one for the migration to UNE-P and one for the project-managed hot cut. In combination these two charges can foreclose AT&T's ability to serve a customer economically. Second, if AT&T cannot expand its customer base with sufficient speed to meet market expectations then

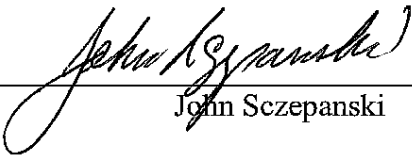
^{10/} The use of the bulk conversion process allows the migrations to be done outside of regular business hours, allowing for efficient AT&T work force management and providing for dedicated support from the ILEC to perform the cut and manage any potential failures when the customer is generally not conducting business.

^{11/} At the same time, by successfully moving these customers to the AT&T network, they generate increased cash flows that help make further facility and switch investment possible. However, high non-recurring charges proposed by ILECs -- now becoming more common -- jeopardize AT&T's ability to take broad advantage of a UNE-P to UNE-L transition.

capital will dry up -- an occurrence already amply evident in the market. Indeed a lack of sufficient customers means AT&T's existing collocation and switching resources are underutilized, which in turn reduces AT&T's ability to self-fund (or externally fund) its efforts at facility-based competition.

16. In sum, AT&T services that rely on hot cuts cannot be competitive with the ILECs' local services and lead to facility-based competition unless hot cuts are performed almost flawlessly and at least as timely, accurately and cheaply as software-based transitions of customers whose service is provided through the use of UNE-P. Thus, it is critical that the Commission thoroughly review and reset the performance benchmark standards for hot cuts to a level that permits efficient competition to develop and to assure that the costs for such transitions do not simply create another competitive barrier to entry. As evidenced by AT&T's experience with the New York process for hot cuts, the Commission should establish hot cut benchmarks that ILECs achieve an on-time hot cut delivery level of no less than 98% and a dial tone interruption rate of under 1%.

I declare under penalty of perjury that the foregoing is true and correct.



John Szczepanski

Dated: This 22 day of JANUARY, 2002.